IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 2, 2004

IN RE ADOPTION OF JOHN ALLEN KLESHINSKI AND KEVIN RAY KLESHINSKI

CHIRLENA JEAN KLESHINSKI AND JOHN EDWARD KLESHINSKI
v.
JULIA ELIZABETH KLESHINSKI

An Appeal from the Chancery Court for Lincoln County
No. A-186 J. B. Cox, Chancellor

No. M2004-00986-COA-R3-CV - Filed May 4, 2005

CONCURRING OPINION

While I concur with the decisions reached by the majority in this case, I write separately to voice my concerns regarding the manner in which the majority approaches the best interest analysis mandated by section 36-1-113(c)(2) of the Tennessee Code.

First, the majority states that, like the grounds for termination, a party seeking to terminate a biological parent's parental rights must also prove by clear and convincing evidence that doing so is in the children's best interest. I fully recognize the existence of a line of decisions rendered by this Court which would support the majority's assertion. ***See In re J.J.C.***, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004); ***Means v. Ashby***, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003); ***State v. Demarr***, No.

M2002-02603-COA-R3-JV, 2003 Tenn. App. LEXIS 569, at *23–24 (Tenn. Ct. App. Aug. 13, 2003); ***In re C.M.R.***, No. M2001-00638-COA-R3-JV, 2002 Tenn. App. LEXIS 105, at *12 (Tenn. Ct. App. Feb. 7, 2002); ***In re T.S.***, No. M1999-01286-COA-R3-CV, 2000 Tenn. App. LEXIS 451, at *13 (Tenn. Ct. App. July 13, 2000).

It is apparent from reading the unambiguous language used by the legislature in section 36-1-113(c) of the Tennessee Code, however, that only one of the requirements for terminating a biological parent's parental rights requires clear and convincing proof. ***See*** Tenn. Code Ann. § 36-1-113(c) (2003). While I fully recognize the value of precedent, ***Evans v. Steelman***, No. 01-A-01-9511-JV-00508, 1996 Tenn. App. LEXIS 625, at *20–26 (Tenn. Ct. App. Oct. 2, 1996) (Koch, J., dissenting), I simply express my concern over the imposition of a heightened standard of proof on the trial courts of this state when undertaking a best interest analysis given the language selected by the legislature. ***See In re D.L.B.***, 118 S.W.3d 360, 368 (Tenn. 2003); ***In re E.N.R.***, 42 S.W.3d 26, 29 (Tenn. 2001). As our supreme court has acknowledged, section 36-1-113(c) of the Tennessee Code, requires:

> [***F***]***irst*** a "finding by the court by clear and convincing evidence that the grounds for termination or parental or guardianship rights have been established" and ***then*** a finding that the "termination of the parent's or guardian's rights is in the best interests of the child[.]"

In re D.L.B., 118 S.W.3d 360, 368 (Tenn. 2003) (emphasis added). Accordingly, while I agree with the majority's decision to remand this case to the trial court so that it may conduct a best interest analysis, I would not impose upon the trial court a heightened standard of proof not required by the statute.

Second, I express my concern with the manner in which the majority has chosen to remand this case to the trial court. In ***In re Muir***, No. M2002-02963-COA-R3-CV, 2003 Tenn. App. LEXIS 831 (Tenn. Ct. App. Nov. 25, 2003), this Court addressed a trial court's statutory duty to make specific findings of fact in parental termination cases, stating:

> A trial court's responsibility to make findings of fact and conclusions of law in termination cases differs materially from its responsibility in other civil cases. Generally, trial courts, sitting without juries, are not required to make findings of fact or conclusions of law unless requested in accordance with Tenn. R. Civ. P. 52.01. Termination cases, however, are another matter. Tenn. Code Ann. § 36-1-113(k) explicitly requires trial courts to "enter an order which makes specific findings of fact and conclusions of law" in termination cases. Thus, ***trial courts must prepare and file written findings of fact and conclusions* [*of*] *law with regard to every disposition of a petition to terminate parental rights***, whether they have been requested or not.
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> Tenn. Code Ann. § 36-1-113(k) reflects the Tennessee General Assembly's recognition of the necessity of individualized decisions in these cases. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999) (holding that termination cases require "individualized decision making"). It also reflects the General Assembly's understanding that findings of fact and conclusions of law facilitate appellate review and promote the just and speedy resolution of appeals. *Bruce v. Bruce*, 801 S.W.2d 102, 104 (Tenn. Ct. App. 1990). Because of Tenn. Code Ann. § 36-1-113(k), trial courts cannot follow the customary practice of making oral findings from the bench and later adopting them by reference in their final order.
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> When a trial court has not complied with Tenn. Code Ann. § 36-1-113(k), ***we cannot simply review the record* de novo *and determine for ourselves where the preponderance of the evidence lies as we would in other civil, non-jury cases***. In accordance with *In re D.L.B.*, 118 S.W.3d at 365, 2003 Tenn. LEXIS 983, 2003 WL 22383609, at *6, we ***must remand*** the case for the preparation of appropriate written findings of fact and conclusions of law.

In re Muir, 2003 Tenn. App. LEXIS 831, at *8–10 (emphasis added); ***see also In re D.L.B.***, 118 S.W.3d 360, 367 (Tenn. 2003).

In subsequent decisions, this Court, recognizing the mandatory nature of the language found in section 36-1-113(k) of the Tennessee Code, has firmly established that, when a trial court fails to perform its statutorily required duty in parental termination cases, this Court must remand the case to the trial court for the entry of written findings of fact and conclusions of law. ***See In re M.J.M.***, No. M2004-02377-COA-R3-PT, 2005 Tenn. App. LEXIS 221, at *18–19 (Tenn. Ct. App. Apr. 14, 2005); ***In re F.R.R.***, No. M2004-02208-COA-R3-PT, 2005 Tenn. App. LEXIS 130, at *8–9 (Tenn. Ct. App. Mar. 1, 2005); ***In re M.O.***, No. M2004-01602-COA-R3-PT, 2005 Tenn. App. LEXIS 125, at *14–15 (Tenn. Ct. App. Feb. 25, 2005); ***State v. C.H.K.***, 154 S.W.3d 586, 590–91 (Tenn. Ct. App. 2004); ***In re R.C.P.***, No. M2003-01143-COA-R3-PT, 2004 Tenn. App. LEXIS 449, at *18–19 (Tenn. Ct. App. July 13, 2004); ***In re M.J.B.***, 140 S.W.3d 643, 653–54 (Tenn. Ct. App. 2004); ***In re C.M.M.***, No. M2003-01122-COA-R3-PT, 2004 Tenn. App. LEXIS 160, at *16–17 (Tenn. Ct. App. Mar. 9, 2004); ***State v. McBee***, No. M2003-01326-COA-R3-PT, 2004 Tenn. App. LEXIS 85, at *14–16 (Tenn. Ct. App. Feb. 9, 2004); ***In re S.M.***, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); ***In re K.N.R.***, No. M2003-01301-COA-R3-PT, 2003 Tenn. App. LEXIS 915, at *6–8 (Tenn. Ct. App. Dec. 23, 2003). We have also noted that the statutory requirement to prepare written findings of fact and conclusions of law applies with equal force to the best interest component of parental termination cases. ***See White v. Moody***, No. M2004-01295-COA-R3-PT, 2004 Tenn. App. LEXIS 890, at *8 (Tenn. Ct. App. Dec. 30, 2004) (noting that, when handling a parental termination case for the third time on appeal, this Court had previously remanded the case to the trial court due to its failure to enter written findings of fact and conclusions of law on the best interest factors); ***In re C.R.B.***, No. M2003-00345-COA-R3-JV, 2003 Tenn. App. LEXIS 804, at *12 (Tenn. Ct. App. Nov. 13, 2003) ("The findings of fact and conclusions of law required by Tenn. Code Ann. § 36-1-113(k)

must address the two necessary elements of every termination case.").

In ***White v. Moody***, No. M2004-01295-COA-R3-PT, 2004 Tenn. App. LEXIS 890 (Tenn. Ct. App. Dec. 30, 2004), ***cert. denied***, 2005 Tenn. LEXIS 265 (Tenn. 2005), this Court had before it a parental termination case for the third time on appeal. ***White***, 2004 Tenn. App. LEXIS 890, at *1. In the original appeal, this Court affirmed the trial court's findings regarding the grounds for termination, but, regarding the best interest analysis, we stated:

> We noted that the trial court had failed to make a specific finding that terminating Mr. Moody's parental rights was in Nicole's best interests. *Accordingly, we remand the case to the trial court with directions to conduct a hearing regarding whether terminating Mr. Moody's parental rights was in Nicole's best interests*.

Id. at *8 (emphasis added). Not only did this Court remand so that the trial court could comply with the requirements of section 36-1-113(k) of the Tennessee Code, but we directed the trial court to conduct a new hearing on remand. ***Id***.

Regarding the actions taken by the trial court on remand, this Court stated:

> The trial court conducted two days of hearings in November 2001 and March 2002 to determine whether terminating Mr. Moody's parental rights was in Nicole's best interests. During this hearing, the trial court limited its consideration to the original record and declined to permit the parties to introduce new evidence regarding events occurring after March 2000. Ultimately, in April 2002, the trial court entered a second order concluding that terminating Mr. Moody's parental rights was in Nicole's best interests. Mr. Moody appealed again. On July 25, 2003, *we again vacated the judgment terminating Mr. Moody's parental rights after concluding that the parties should have been permitted to present evidence regarding Nicole's best interest*.

Id. at *9 (emphasis added). After the trial court conducted another hearing involving new evidence and entered its third order, the case came before this Court for the third time on appeal. ***Id***. at *10–11. After recognizing a trial court's duty to enter written findings of fact and conclusions of law in parental termination cases, this Court "determined that this case should not be remanded for the entry of written findings of fact and conclusions of law because of the inordinate delay that has already occurred in the final disposition of this case." ***Id***. at *11.

The aforementioned cases have firmly established that it is the trial court, not this Court, which must conduct the best interest analysis mandated by section 36-1-113(c)(2) of the Tennessee Code. Thus, it is apparent that, if a trial court does not conduct a best interest analysis in a parental termination case, this Court must vacate the trial court's order and remand the case to the trial court with instructions that it comply with its statutorily required duty. We must also instruct the trial court that, in conducting a best interest analysis, it must enter written findings of fact and conclusions of law in accordance with section 36-1-113(k) of the Tennessee Code. Furthermore, on remand, the trial court may, as the majority correctly notes, conduct a new hearing and entertain new evidence to enable it to reach a decision on the best interest issue.

In this case, however, the majority has gone further and commented on the evidence, or lack thereof, presented during the initial hearing. Not only is doing so totally unnecessary given the trial court's ability to conduct an entirely *de novo* hearing on remand, but it also gives the impression of

attempting to steer the trial court to reach a particular conclusion.[1] It is a firmly established principle of appellate jurisprudence that the appellate courts will not issue advisory opinions on issues which must be remanded to the trial court for further action. In a concurring opinion authored by Justice Brock of the Tennessee Supreme Court he stated: "But it is my view that such opinion should be limited to a statement of the reasons for refusal to take jurisdiction of the merits of the case; anything more is dictum and amounts to an advisory opinion which we are not authorized to give." ***Pairamore v. Pairamore***, 547 S.W.2d 545, 550 (Tenn. 1977) (Brock, J., concurring) (citing ***Crane Enamelware Co. v. Smith***, 76 S.W.2d 644 (Tenn. 1934); ***Reed v. Rhea County***, 225 S.W.2d 49 (Tenn. 1949)); ***see also Nichols v. State***, 90 S.W.3d 576, 607 (Tenn. 2002); ***State v. Brown & Williamson Tobacco Corp.***, 18 S.W.3d 186, 193 (Tenn. 2000); ***Tweed v. Kiser***, No. E2003-02923-COA-R3-CV, 2004 Tenn. App. LEXIS 682, at *12–13 (Tenn. Ct. App. Oct. 19, 2004); ***State v. Ward***, 138 S.W.3d 245, 272 (Tenn. Crim. App. 2003); ***Johnson v. City of Clarksville***, No. M2001-002273-COA-R3-CV, 2003 Tenn. App. LEXIS 413, at *12 (Tenn. Ct. App. June 3, 2003); ***Winkler v. Tipton County Bd. of Educ.***, 63 S.W.3d 376, 384 (Tenn. Ct. App. 2001); ***Doe v. Mama Taori's Premium Pizza, LLC***, No. M1998-00992-COA-R9-CV, 2001 Tenn. App. LEXIS 224, 38–39 (Tenn. Ct. App. Apr. 5, 2001); ***J.C. Bradford & Co. v. S. Realty Partners***, No. W1999-01617-COA-R3-CV, 2000 Tenn. App. LEXIS 555, at *31 (Tenn. Ct. App. Aug. 14, 2000).

Accordingly, I would simply vacate the trial court's order and remand this case to the trial

[1]The majority makes the following comments on the evidence pertaining to the best interest analysis: "the trial court's other findings are somewhat inconsistent with any implication that termination was in the best interest of her sons"; "the record has little evidence that termination of Mother's parental rights was in the best interest of the two boys"; [t]here was no evidence that the children had ever suffered ill effects from visiting with Mother"; "so the effect of a change of caretakers on the children appears inapplicable."

court with the following limited instructions: (1) conduct the statutorily required best interest analysis; (2) if the trial court determines that the record in its present form prevents the court from conducting a best interest analysis, then the trial court may conduct a new hearing and entertain additional evidence to aid it in this endeavor; and (3) when rendering its decision, the trial court should enter specific written findings of fact and conclusions of law.